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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 615

FERNAND C. A. ADDA, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 1-10) are reported at 10 T. C. 273. The opinion of the Court of Appeals for the Fourth Circuit (R. 36-37) is reported at 171 F. 2d 457.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 3, 1948.

(R. 37.) The petition for a writ of certiorari was filed on March 1, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Taxpayer, a nonresident alien, dealt extensively in commodity futures by empowering his brother who lived in the United States to buy and sell for him at the brother's discretion. The question is whether the courts below erred in holding that the income from these transactions was taxable because taxpayer was engaged in trade or business in the United States, within the meaning of Section 211 (b) of the Internal Revenue Code, and did not come within the provision excluding "transactions in the United States in * * * commodities through a resident broker * * *."

STATUTE AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra,* pp. 10-13.

STATEMENT

The facts found by the Tax Court (R. 2-4) may be summarized as follows:

Taxpayer is a national of Egypt who went to France in May, 1940, and resided in France through the taxable year 1941. He has never been a resident of the United States nor a resident of North, South, or Central America or the West Indies or the Hawaiian Islands. (R. 2.)

Taxpayer made some trades in commodities on commodity exchanges in the United States through

resident brokers during and prior to the taxable year, trading in cotton, wool, grains, silk, hides, and copper. (R. 2.)

In August 1939, taxpayer discussed with his brother, Joseph Adda, who intended to visit the United States, the possibility that war might affect the taxpayer's ability to communicate with his brokers in the United States and authorized Joseph, in case of such interruption of communications, to act for taxpayer in placing orders for the purchase or sale of commodities. Taxpayer outlined the general trading policy which he desired to have followed. Taxpayer told Joseph he had credits with the firms of George H. McFadden & Bro., George F. Jones & Son, and Bond, McEnany & Company, and asked Joseph to advance the necessary funds if the market went against him and taxpayer could not forward money. (R. 2.)

Taxpayer wrote on February 15, 1940, from Alexandria, Egypt, to George H. McFadden & Bro. (R. 2-3), as follows:

> You are to consider this letter your full authority to accept orders in commodity futures from Mr. Joseph A. Adda and to enter any resultant trades in an account to be known as "Fernand C. A. Adda, a/c Joseph A. Adda". It is hereby understood that I assume full moral and financial responsibility for this account in the same manner as all other accounts standing in my name on your books. I also hereby confirm that all trades already entered

in "Fernand C. A. Adda, a/c Joseph A. Adda" on orders of Mr. Joseph A. Adda also have my approval and guarantee.

You are hereby also advised that all formal confirmations covering trades executed on orders from Mr. Joseph A. Adda and placed in "Fernand C. A. Adda, a/c Joseph A. Adda" are to be forwarded to Mr. Joseph A. Adda, who has my authority to approve same. Likewise all liquidation statements, and all other accounting records in connection with this account are to be forwarded to Mr. Joseph A. Adda.

You are also to consider this letter your full authority to transfer from any of my other accounts with you such funds as in your opinion are necessary to properly protect the account designated as "Fernand C. A. Adda, a/c Joseph A. Adda". In addition you are authorized to make payments to Mr. Joseph A. Adda or to anyone else he may designate, without any further approval on my part, and to charge such payment or payments to such of my accounts as seem proper to you.

Taxpayer fell into the hands of the Germans in France in December, 1940. While under surveillance in a hospital, taxpayer sent a message dated January 27, 1941, to Bond, McEnany & Company to accept instructions of Joseph Adda regarding the taxpayer's accounts. (R. 3.)

During the taxable year 1941, on account of conditions brought on by the war, taxpayer was cut off part of the time from satisfactory means of

communication with his brokers or his brother in the United States. Commodities transactions were effected for his account by his brother, Joseph, then a resident of New York, New York, which resulted in gains in excess of losses in the amount of $193,857.14. (R. 4.)

Joseph was not compensated by taxpayer for his services in effecting transactions in commodities in 1940 and 1941. Taxpayer gave Joseph full and complete authority in dealing for taxpayer in commodities to use his own discretion and judgment as to when to buy or sell for taxpayer's account and the prices at which the sales or purchases were to be made. Taxpayer, during 1940 and 1941, was a nonresident alien engaged in trade or business in the United States. (R. 4.)

On the basis of these findings, the Tax Court, in a decision reviewed by the full court, unanimously concluded that the profits resulting from the transactions effected for his account by his brother were capital gains taxable to him because they resulted from his having engaged in trade or business within the United States. (R. 8.)

The Court of Appeals for the Fourth Circuit affirmed *per curiam*. (R. 36-37.)

ARGUMENT

Section 211 (b) of the Internal Revenue Code, Appendix, *infra,* withdraws the special income tax treatment of nonresident aliens provided by Section 211 (a) from nonresident aliens "engaged

in trade or business in the United States" but excludes from that phrase the "effecting of transactions in the United States in * * * commodities through a resident broker." The courts below held that extensive trading in commodity futures is a business [1] and that taxpayer's transactions in 1941 which produced the income, the tax liability for which is disputed, constituted a business carried on in the United States because they were not effected through resident brokers.

1. The latter conclusion was based on the undisputed fact that the taxpayer's commodity transactions in this country were effected by taxpayer's brother, resident in the United States, who had full discretion to buy and sell for taxpayer's account. (R. 4.) We think that this conclusion is required by the unambiguous language of the statute because transactions effected through a resident agent who is not a broker are obviously not effected through a resident broker.[2]

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[1] Taxpayer raises no question here, nor could he successfully on this record (R. 6), that the trading was not in such volume as to constitute a business if transactions in commodities are of a type that can ever be so characterized.

[2] This result is fortified by the legislative history which shows that the phrase in question was added in executive session of the Senate Finance Committee at the suggestion of the Treasury Department (Confidential Hearings Before Committee on Finance, 74th Cong., 2d Sess. (Part 11), p. 46) and was intended as a clarifying amendment (S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21-22 (1939-1 Cum. Bull. (Part 2) 678, 691)). The amendment was thought desirable to put at rest the controversy which had arisen with respect to whether corporations were carrying on businesses in this country solely as a result of transactions effected from abroad

The petition does not allege that the decision below on this issue conflicts with any decision of this Court or of any Court of Appeals; and no such conflict exists. The principal reliance for issuance of the writ, although variously worded (Pet. 5-13), is based on the claim that the decision below is erroneous. Since the decision is so obviously in accord with the plain statutory language, it can not cause uncertainties which the taxpayer suggests.[3]

The suggestion that the decision is inconsistent with a subsequent Tax Court decision (*Constantinescu* v. *Commissioner,* 11 T.C. 36) (Pet. 13-14), in addition to not furnishing a basis for the issuance of the writ, is without foundation. The issue there, conceded here, was whether the taxpayer was a nonresident, and not, as here, whether the taxpayer was engaged in trade or business.

2. The contention that the decision is "probably in conflict" with the decisions of this Court in *Deputy* v. *duPont,* 308 U.S. 488; *Higgins* v. *Commissioner,* 312 U.S. 212; *City Bank Co.* v. *Helvering,* 313 U.S. 121; and *United States* v. *Pyne,* 313 U.S. 127 (Pet. 15-16), has no merit. *Deputy* v.

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through resident brokers. See *Union Internationale de Placements* v. *Hoey,* 96 F. 2d 591 (C.A. 2d).

[3] Characteristic of petitioner's attack on the decision below is the contention that it conflicts with various treaty provisions. But the conflict results only if there is read into the treaties what petitioner reads into the statute, namely, that all trading in commodities in the United States by nonresident aliens is exempt from tax.

duPont expressly did not reach the question whether taxpayer was carrying on a trade or business.[4] *Higgins, City Bank* and *Pyne* dealt not with speculation in commodities or securities, as here, but with conservation of estates.[5] Indeed, the decision below that extensive speculation can constitute a trade or business finds direct support in decisions of this Court and of the Courts of Appeals. *Snyder* v. *Commissioner,* 295 U.S. 134, 139; *Fuld* v. *Commissioner,* 139 F. 2d 465 (C.A. 2d); *Dart* v. *Commissioner,* 74 F. 2d 845 (C.A. 4th); *Wiesler* v. *Commissioner,* 6 T.C. 1148, affirmed without discussion of this issue, 161 F. 2d 997 (C.A. 6th); see *Gruver* v. *Commissioner,* 142 F. 2d 363, 367 (C.A. 4th); *512 W. Fifty-Sixth St. Corp.* v. *Commissioner,* 151 F. 2d 942, 943 (C.A. 2d); cf. *Helvering* v. *Winmill,* 305 U.S. 79.

Finally, there is no conflict even if *Higgins, Pyne* and *City Bank* were intended to cover speculation in securities and commodities because they dealt with what constitutes "trade or business" in Section 23 (a) (26 U.S.C. 1946 ed., Sec.

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[4] Speaking of the trade or business issue, the Court stated (p. 493), "But as we view the case it is unnecessary for us to pass on that contention and to make the delicate dissection of administrative practice which that would entail. * * *"

[5] Thus in *Higgins* this Court said (p. 218), "The petitioner merely kept records and collected interest and dividends from his securities, through managerial attention for his investments." *City Bank Co.* did not even involve an individual but a trustee whose activities were limited to "passive investment" with only an occasional sale of securities. *United States* v. *Pyne,* decided the same day, was factually similar to *City Bank.*

23). Whatever the proper result is under that section, it is clear that the phrase in Section 211 (b) must include buying and selling commodities or the exclusion from the definition for those who effect such transactions through resident brokers is without meaning. The necessary implication of the statutory provision is that transactions in securities or commodities otherwise effected are covered by the clause "engaged in trade or business within the United States."

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1949.

APPENDIX

Internal Revenue Code:

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

* * *

(b) *United States Business or Office.*—A nonresident alien individual engaged in trade or business in the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a). As used in this section, section 119, section 143, section 144, and section 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year, but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year and whose compensation for such services does not exceed in the aggregate $3,000. Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities through a resident broker, commission agent, or custodian.

* * *

(26 U. S. C. 1946 ed., Sec. 211.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.211-1. *Taxation of aliens in general.* —For the purposes of chapter 1 alien individuals are divided generally into two classes, namely, resident aliens and nonresident aliens. Resident aliens are in general taxable the same as citizens of the United States, that is, a resident alien is taxable on income derived from all sources including sources without the United States. Nonresident aliens are taxable only on income from sources within the United States. * * *

SEC. 19.211-7. *Taxation of nonresident alien individuals.*—For the purposes of this section * * *, nonresident alien individuals are divided into three classes: (1) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year not more than $21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; (2) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year more than $21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; and (3) nonresident alien individuals who at any time during the taxable year are engaged in trade or

business in the United States or have an office or place of business therein.

* * *

(c) *United States business or office.*—A nonresident alien individual within class (3), referred to in the first paragraph of this section, is not taxable at the rate of 10 percent upon the items of gross income enumerated in section 211 (a). The net income from sources within the United States of such a nonresident alien individual (gross income from sources within the United States minus the statutory deductions provided in sections 23 and 213) less the credits against net income allowable to an individual by section 25, is subject to the normal tax of 4 percent imposed by section 11 and the graduated surtax imposed by section 12 (b).

As used in sections 119, 143, 144, 211, and 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation not engaged in trade or business within the United States by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of 90 days during the taxable year and whose compensation for such services does not exceed in the aggregate $3,000. Such phrase does not

include the effecting of transactions in the United States in stocks, securities, or commodities (including hedging transactions) through a resident broker, commission agent, or custodian. (See also section 19.212-1.)

Whether a nonresident alien has an "office or place of business" within the United States depends upon the facts in a particular case. The term "office or place of business," however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected.

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